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11 DARYL DE KECZER,
12 Plaintiff,
13 v.
14 TETLEY USA, INC.,
15 Defendant.

Case No. [5:12-cv-02409-EJD](#)

**ORDER DENYING PLAINTIFF'S
MOTION FOR LEAVE TO FILE A
FOURTH AMENDED COMPLAINT**

Re: Dkt. No. 80

16 Presently before the Court is Daryl de Keczer's ("Plaintiff" or "de Keczer") Motion for
17 Leave to File a Fourth Amended Complaint ("Motion"). See Dkt. No. 80. The Court found this
18 matter suitable for decision without oral argument pursuant to Civil Local Rule 7-1(b) and
19 previously vacated the hearing. The Court has subject matter jurisdiction pursuant to 28 U.S.C. §
20 1332. Having fully reviewed the parties' briefing, and for the following reasons, the Court
21 DENIES Plaintiff's Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

23 Plaintiff Daryl de Keczer filed this putative class action against Defendant Tetley USA Inc.
24 ("Defendant" or "Tetley") alleging that Tetley has made, and continues to make, false and
25 deceptive claims on its misbranded packaged food products in violation of federal and California
26 laws. See Dkt. No. 1.

27 Tetley claims on its labeling package that its product is an "excellent source of natural
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1 antioxidants.” See Dkt. No. 59 at 3. Plaintiff alleges that this violates nutrient content labeling
2 regulations mandated by federal and California law which limit such labels to products that
3 contain, per serving, at least 10% of the DRV of any one antioxidant. Tetley also claims its
4 product is the “smart choice for your healthy lifestyle.” See id. Plaintiff alleges Tetley’s products
5 do not have approval from FDA to make health related claims. See id. Plaintiff argues that this
6 claim violates 21 U.S.C. § 352(f)(1) and as such, the Tetley products are misbranded. See id.

7 Defendant denies that any laws were violated and contends that Plaintiff’s claims lack
8 merit. See id. Specifically, Defendant alleges that Plaintiff lacks Article III standing to bring
9 claims for products he did not purchase and statements he did not see and rely upon. See id.

10 Plaintiff filed a Class Action Complaint on May 11, 2012. See Dkt. No. 1. The Complaint
11 included a claim for “Restitution Based on Unjust Enrichment/Quasi-Contract.” Id. On July 23,
12 2012, Defendant filed a motion to dismiss. See Dkt. No. 14. Among other things, Defendant
13 argued that Plaintiff’s unjust enrichment claim failed as a matter of law and was superfluous given
14 the other claims in the case. Id. On August 13, 2012, Plaintiff filed an Amended Complaint again
15 stating a claim for “Restitution Based on Unjust Enrichment/Quasi-Contract.” See Dkt. No. 21.
16 Defendants again moved to dismiss. See Dkt. No. 22.

17 On August 16, 2013, the Court granted Defendants’ motion to dismiss. See Dkt. No. 47.
18 The Court dismissed Plaintiff’s breach of warranty claims with prejudice and dismissed the
19 remaining claims, including the unjust enrichment claim, with leave to amend. Id. The Court
20 ordered Plaintiff to file any amended claims “within 15 days.” Id.

21 Thereafter, Plaintiff filed a Second Amended Complaint (“SAC”) on September 3, 2013,
22 and a Third Amended Complaint (“TAC”) on September 15, 2014. See Dkt. Nos. 48, 72. Both
23 Plaintiff’s Second Amended Complaint and Third Amended Complaint did not include a formal
24 claim for unjust enrichment. See Dkt. Nos. 71, 72. Defendant filed a Motion to Dismiss the
25 Second Amended Complaint on October 18, 2013. See Dkt. No. 54. Defendant answered the
26 Third Amended Complaint on October 17, 2014. See Dkt. No. 75. Presently before the Court is
27 Plaintiff’s motion for leave to amend. See Dkt. No. 80.

1 II. LEGAL STANDARD

2 Most motions to amend the pleadings are initially subject to the liberal standard for
3 amendments contained in Federal Rules of Civil Procedure 15. Fed. R. Civ. P. 15(a)(2) ("The
4 court should freely give leave [to amend] when justice so requires."); Morongo Band of Mission
5 Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). But here, the court-imposed deadline for
6 amendments to the pleadings expired before this motion was filed. As such, Plaintiff's motion is
7 preliminarily governed by Rule 16 rather than Rule 15. Johnson v. Mammoth Recreations Inc.,
8 975 F.2d 604, 607-608 (1992).

9 Under Rule 16, Plaintiff must initially demonstrate sufficient "good cause" to modify the
10 scheduling order so as to allow for the late amendments. See id.; see also Fed. R. Civ. P. 16(b)(4)
11 ("A schedule may be modified only for good cause and with the judge's consent."). If, and only
12 if, the requisite good cause is shown, the court then turns to an examination of the relevant factors
13 under Rule 15. Hood v. Hartford Life & Accident Ins. Co., 567 F. Supp. 2d 1221, 1224 (E.D. Cal
14 2008); Johnson, 975 F.2d at 609 ("If that party was not diligent, the inquiry should end.").

15 III. DISCUSSION

16 In examining this matter, the Court must be mindful of what can constitute "good cause"
17 under Rule 16. "Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of
18 the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s
19 'good cause' standard primarily considers the diligence of the party seeking the amendment."
20 Johnson, 975 F.2d at 609. "The district court may modify the pretrial schedule if it cannot
21 reasonably be met despite the diligence of the party seeking the extension." Id. (internal
22 quotations omitted). "[N]ot only must parties participate from the outset in creating a workable
23 Rule 16 scheduling order but they must also diligently attempt to adhere to that schedule
24 throughout the subsequent course of the litigation." Jackson v. Laureate, Inc., 186 F.R.D. 605,
25 607 (E.D. Cal. 1999).

26 Having considered the positions of both parties, Plaintiff has not met its burden under Rule
27 16. First, the Court granted Plaintiff leave to amend his claim for unjust enrichment when it was
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1 dismissed, but Plaintiff failed to do so within the 15 days afforded by the Court's order. See Dkt.
2 No. 47 at 7. Plaintiff elected not to file an amended claim within that time and omitted a claim for
3 unjust enrichment from the subsequent Second Amended Complaint and Third Amended
4 Complaint. Instead, more than 18 months later, and without any reasonable explanation for the
5 delay, Plaintiff now seeks leave to re-plead the unjust enrichment claim. Due to the lapse in time
6 and absent a formal claim for unjust enrichment in subsequent pleading, the unjust enrichment
7 claim has been waived. See Lacey v Maricopa County, 693 F.3d 896, 928 (9th Cir. 2012) (en
8 banc).

9 Second, Plaintiff simply seeks an order permitting the filing of the amended complaint
10 without moving for relief under Rule 16 or demonstrating that the Rule's requirements are met.
11 Johnson, 975 F.2d at 975. As such, Plaintiff's motion is procedurally defective.

12 Finally, even were the Court to consider the motion as a de facto motion pursuant to Rule
13 16, Plaintiff has failed to demonstrate good cause to permit amendment of the complaint. Here,
14 Plaintiff's requested amendment pertains to facts that it was well-aware of at the time of the filing
15 of the Second Amended Complaint and Third Amended Complaint. See Dkt. Nos. 48, 72. This
16 case has been pending for almost three years. Despite the ample time and opportunities, Plaintiff
17 offers no explanation for not seeking leave to amend before it filed the Second or Third Amended
18 Complaint. Under such circumstances, Plaintiff has not demonstrated the requisite diligence.

19 **IV. CONCLUSION**

20 Based on the foregoing reasons, Plaintiff's Motion for Leave to File a Fourth Amended
21 Complaint is DENIED.

22 **IT IS SO ORDERED.**

23 Dated: July 10, 2015



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25 EDWARD J. DAVILA
United States District Judge
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